

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 5994/2007 and CM 11145/2007

August 17, 2007

INTEGRATED TECHNO SYSTEMS PVT LTD Petitioner
Through Mr. H.S. Sharma, Advocate

versus

N.D.M.C & ORS Respondents
Through Ms. Anjana Gosain, Advocate for the NDMC.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

1. Whether reporters of local papers may be allowed to see the judgment.? yes
2. To be referred to the Reporter or not? yes
3. Whether the judgment should be reported in the Digest? yes

Mr. Justice S. Ravindra Bhat (Open Court)

1. Issue notice. Ms. Anjana Gosain, learned counsel accepts notice on behalf of the New Delhi Municipal Committee (hereafter "NDMC"). With consent of counsel for the parties, the matter was heard finally.

2. The petitioner challenges an order dated 22.12.2006 by which it was been debarred from tendering for a period of two years. The impugned order was made by the NDMC. The petitioner was awarded a consultancy contract in 2003 for technical repair and desilting of SWD system in NDMC area under sub-head survey of SWD system for GIS mapping. The price bid was submitted pursuant to the NDMC's request on 28.5.2003. The petitioner was informed that its tender was accepted on 8.8.2003. It is

not disputed that thereafter the petitioner commenced its work. Apparently, the petitioner was executing the contract till 15.7.2004 when the respondent acting through its Executive Engineer(Drainage) rescinded it. This was preceded what was termed as a final show cause notice on 22.2.2004. It is further not disputed that the decision was accepted by the petitioner who did not seek legal recourse.

3. On 8.6.2006, the NDMC issued a show cause notice proposing to debar the petitioner from tendering with it for a period of two years. The show cause notice reads as follows:

“To,

*M/s. Integrated Techno System (P) Ltd.
118-B, Shahpur Jat, Second Floor
Opposite Khel Gaon,
New Delhi – 49.*

Sub: - T/R and desilting of SWD system in NDMC area.

SH: - Survey of SWD system in NDMC area for GIS mapping.
(SHOW CAUSE NOTICE)

Sir,

The above noted work was awarded to you by EE(Dr.) vide letter of award No. D/184-194/EE(Dr.) dated 8-8-2003 with stipulated ate of start and completion as 18-8-2003 and 18-4-2004 respectively. Inspite of repeated letters/reminders/notices dated 10-2-2004, 25-2-2004, 12-3-2004 and 22-6-2004. But you have failed to complete the aforesaid work. This act on your part is unbecoming of a contractor.

In view of the above, you are hereby given notice to show cause within 07 days from the date of issue of this notice as to why you may not be debarred from further tendering in NDMC, for a period of two year. In case you fail to show cause with in a stipulated period or the cause shown by you is not found to the satisfaction of the competent authority action against you as contemplated above shall be taken without any further notice.

(S.M. Kumar)

SR. ACCOUNTS OFFICER (W) -I”

4. The petitioner replied to this show cause notice and recorded its objections by letters dated 22.6.2006 and 27.9.2006. The communications were detailed and it sought to give particulars about the claims that the petitioner proposed against the NDMC.

5. On 22.12.2006, the NDMC issued the impugned order, in the following terms:

“D.No./A-III/254/CE(C)-I/SR.A.O. (W)-I

Dated 22.12.2006

To

*M/s. Integrated Techno System)P) Ltd.
118-B, Shahpur Jat, IInd Floor
Opposite Khel Gaon
New Delhi – 49.*

Sub:- T/R and desilting of SWD system in NDMC area.

SH:- Survey of SWD system in NDMC area for GIS Mapping.

The above said work was awarded to you vide letter No. E.E. (Drainage) D/184-94 dt. 8-8-2003 with stipulated date of start and completion as 18-8-2003 and 18-4-2004 respectively. In spite of repeated letters/reminders/notices dt. 10-2-2004, 25-2-2004, 12-3-2004 and 22-6-2004; but you have failed to complete the aforesaid work. This act on your part is unbecoming of contractor. Subsequently a show cause notice No. D/A-III/153/CE(C)-I/SR.A.O.(W)-I, dt. 8-6-2006 was also served upon you to show cause as to why you may not be debarred from further tendering in N.D.M.C. for a period of two years.

Your reply dated 22-6-2006 received in this office in response to the aforesaid show cause notice has been examined by the competent authority and the same has been found unsatisfactory.

Now, with prior approval of the competent authority, you are, hereby, debarred from further tendering in NDMC for a period of two years. The Earnest money deposited by you also stands forfeited.

(R.C. JAIN)

SR. ACCOUNTS OFFICER(W)-I”

6. Learned counsel for the petitioner urged that the NDMC did not possess the power

to issue the impugned order; no term in the contract enabled the respondent to propose or take action debarring the present petitioner. It was contended on the merits further that during the subsistence of the contract the inter se correspondence between the parties establishes that at every stage the NDMC, its staff and its agencies were obstructing and not co-operating with the petitioner in the smooth functioning and execution of the contract. Learned counsel relied upon letters written by it in this regard on 22.2.2004, 16.3.2004 and other communications. He also relied upon the replies of the NDMC dated 10.2.2004 and 5.2.2004, which he submitted were virtually admissions that the contract could not be completed or executed properly due to the deficiencies and non-cooperation of the NDMC staff.

7. Learned counsel contended that the action of the NDMC, besides being contrary to the contract and unlawful is also arbitrary as it has debarred the petitioner for a period of two years from participating in tender and commercial activities of the NDMC. Its business and right to carry on profession has been gravely imperilled. These were unreasonable, as they deprived the petitioner the opportunity to carry on business with NDMC.

8. Learned counsel for the respondent NDMC resisted the petition. She submitted that this proceeding is not maintainable since the petitioner has neither taken exception to the recession made as far as on 15.7.2004 nor did he approach this Court within reasonable time. Learned counsel contended that the impugned order of debarring was made on 22.12.2006 i.e. almost eight months ago. If the petitioner was really aggrieved by it he could have approached within reasonable time which in this case is a couple of

months. Not having done so, it cannot rely upon the grounds which impelled the NDMC to rescind the contract to challenge the impugned debarring order. Learned counsel contended that the decision to debar the petitioner cannot be challenged on the grounds that the recession was improper. According to her these two decisions are different and have differing consequences. If the petitioner was aggrieved on the recession he ought to have raised that aspect by seeking appropriate remedy; not having done so, his claim in that regard is not maintainable.

9. Learned counsel contended that a public authority like NDMC has sufficient flexibility to enter into contracts which include the power to decide not to enter into contract with a particular agency or concern. Having regard to the past performance of the petitioner concerned, a private agency, the NDMC acting in public interest fairly issued a show cause notice and granted sufficient opportunity to the petitioner to meet with its allegations. Being dissatisfied with the response, the NDMC proceeded to issue the impugned order. There was nothing unfair or arbitrary with such an order.

10. The above facts would show that the petitioner had without doubt not challenged the recession. According to the term of the contract entered into between the NDMC and the petitioner, if the latter is aggrieved it is entitled to invoke the arbitration under Clause 25. The petitioner seems to be aware of it as it is evident from some of its letters written to the NDMC subsequent to the recession on 15.7.2004. The question however is whether the facts persuaded the authority to act as it did in rescinding the contract could also be considered while debarring the petitioner.

11. It is well settled that the State or its instrumentalities and agencies like the

NDMC do not act differently from private bodies while entering into contract. The super added obligation, however, in the case of public bodies is that their character as public agencies cast an additional responsibility upon them to act fairly and non-arbitrarily. The Court had recognised this while entering into contracts. The Supreme Court had stated in *State of M.P. vs. Nand Lal*, 1986(4) SCC 566 that public bodies and state instrumentalities are afforded “free play in the joints”. The Courts are alive to the power of the public agencies to enter into contracts and also rescind contracts. One other principle which is well settled is that the grounds for rescinding the contract or cancelling commercial obligation are ordinarily not subject to judicial review under Article 226. Therefore, the question of deciding whether the debarring order, was rightly based upon a recession to rescind is not open under Article 226.

12. The jurisdiction of the Court under Article 226 in a case of present type where a debarring order is impugned is to scrutinize whether the public agency adopted a fair procedure i.e. in issuing the concern a show cause notice and giving sufficient opportunity to represent against the proposed. Indeed the reported decisions in *Erusian Equipment & Chemicals Ltd. vs. state of West Bengal*, 1975 (1) SCC 70; *Raghunath Thakur vs. State of Bihar*, 1989 (1) SCC 229 and *B.S.N. Joshi vs. Nair Coal Services Ltd.*, 2006 (11) SCC 548 have settled the law on this score. The Court will intervene if it is satisfied that the procedure adopted was unfair, or there was some illegality. In this case, there is no dispute that the impugned order was preceded by a show cause notice dated 8.6.2006; the petitioner was given sufficient opportunity; it resisted the show cause notice by letters dated 22.6.2006 and 27.9.2006. The impugned order was made after

considering these replies.

13. It has been often remarked that the Court in judicial review proceedings under Article 226 is more concerned with the process of decision making rather than the merits of the decision. It does not don the hat of the decision maker or a super-appellate administrative body, examine the soundness of the action. (*Directorate of Education vs. Educomp Datamatics Ltd.*, 2004 (4) SCC 19; *Ramchandra Murarilal Bhattad vs. state of Maharastra*, 2007(2) SCC 588). Although the reach and amplitude of the Court is fairly wide, the Court ordinarily desists from entering into an arena of primary decision making. In this case, the primary decision maker is the NDMC. In such a case, the duty of the Court is to see whether the decision was arrived at after following a fair procedure, considering the relevant factors, and ignoring irrelevant facts. There is nothing on record to suggest that the NDMC did not do so. Its show cause notice, consideration of reply and the consideration of the previous record of the petitioner were all relevant factors. In these circumstances, I am unpersuaded that the impugned order is either arbitrary or suffers from an legal infirmity.

14. For the above reasons, the petition has to fail. This does not preclude the petitioner's right to invoke arbitration under Clause 25. If such request is pending, the same shall be decided and appropriate decision communicated to the petitioner within two weeks from today.

15. The writ petition and CM 11145/2007 are dismissed, but subject to the above directions. No costs.

S. RAVINDRA BHAT,J

AUGUST 17, 2007
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